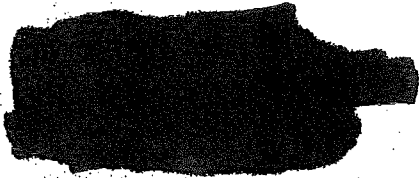


**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF HUMAN SERVICES
APPEALS OFFICE
600 New London Avenue
Cranston, Rhode Island 02920
(401) 462-2132/Fax# (401) 462-0458
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Docket # 15-594
Hearing Date: April 14, 2015

Date: April 17, 2015



ADMINISTRATIVE HEARING DECISION

The Administrative Hearing that you requested has been decided in your favor. During the course of the proceeding, the following issue(s) and agency policy reference(s) were the matters before the hearing:

**INVOLUNTARY RELOCATION RESTRICTIONS
SECTION:0376.40.05.05
NF PATIENT APPEAL RIGHTS
SECTION:0376.40.10
TRANSFER DISCHARGE CRITERIA
SECTION:0376.40.10.05
DOCUMENTATION REQUIREMENTS
SECTION:0376.40.10.10
PRE-TRANSFER/ DISCHARGE NOTICE
SECTION 0376.40.10.15**

The facts of your case, the agency policy, and the complete administrative decision made in this matter follow. Your rights to judicial review of this decision are found on the last page of this decision.

Copies of this decision have been sent to the following: you (the appellant), and facility representative Denise Lacoste.

Present at the hearing were you, representatives from the nursing facility, and a representative from the Alliance for Better Long Term Care.

ISSUE: Should the appellant be discharged/transferred from the facility because: He has endangered the health and safety of residents and employees of the facility?

DHS POLICIES: Please see the attached APPENDIX for pertinent excerpts from the Rhode Island Department of Human Services Policy Manual.

DISCUSSION OF THE EVIDENCE:

The facility representatives testified:

- The facility representative stated that the appellant was having some problems complying with the facility smoking policy as far as not always smoking in the designated smoking areas.
- The appellant on occasion has tried to unlock the main entrance to the facility at night to go outside to smoke. He has been spoken to by Social Services, charge nurses and supervisors, explaining to him that the facility door is locked at night because the facility does not allow anyone to enter during that time.
- The facility representative stated that this was a repeated offense where the appellant would open the door to go outside and ignore what the facility employees had told him. He was told repeatedly that he was putting residents and employees at risk by opening the door at night.
- The facility representative stated that on one occasion the appellant was found smoking in the library by a facility employee. The appellant's smoking inside the facility is the main concern for the health and safety of the residents and employees.
- The facility representative stated that following the smoking incident inside the facility the appellant was put on "supervised smoking" where the appellant now must be supervised while smoking. The appellant is now taken to and from the designated smoking area. An employee lights his cigarette and the appellant is allowed to smoke in the designated area.
- The representative stated that subsequent to being put on supervised smoking the appellant continued to try and open the doors at night to go out and smoke. Unfortunately someone did enter the building at around 12:30 which really scared the staff. On that particular night it was the appellant and another resident who had violated the policy and gone outside as they were able to pry the doors open.
- The representative stated that it was at that time that the facility issued the 30 day discharge notice to the appellant.
- The representative stated that residents are allowed to smoke outside the facility in designated areas at specific times. Due to the heavy snow this winter not all of

the designated areas were available for smoking. After 9:00 pm no smoking is allowed outside the facility because the facility doors are locked.

- The representative stated that there is a smoking room on the ground floor of the facility that is open from 6:00AM until 11:00PM. The smoking room is then available every 2 hours for half an hour through the night. During the day the smoking room is monitored by camera.
- The representative was not sure if the appellant signed a "supervised smoking" agreement, but the appellant did agree to the supervised smoking agreement and turned in his cigarettes and lighter at that time.
- The representative stated that any resident wanting to smoke must be evaluated by the nursing staff to be sure they are competent and able to smoke independently without risk of injury. Residents can smoke anytime during the day in the designated areas.
- The representative stated that at this time the appellant is not allowed to have cigarettes or a lighter on his person. He has to wait for a staff member to accompany him to a designated smoking area.
- The representative stated that the appellant has recently had a lighter in his possession which he apparently got from another resident.
- The facility sent the appellant a Notice of Discharge dated March 9, 2015 notifying him that he would be discharged from the facility 30 days from the date of the notice. (Copy of the notice submitted).
- The notice cites the appellant's above history of continually violating the facility smoking policy.

The appellant testified:

- The appellant stated at this time he is cooperating with the supervised smoking arrangement. He stated that a staff member accompanies him to the designated smoking area and lights his cigarette.
- He stated that he does not remember an incident when he was smoking in the facility library. He stated that he smokes 3 cigarettes per day. He stated that he only smokes in the smoking room and in the outside designated areas.
- He stated that the staff at the facility have been good to him and he wants to continue to reside at the facility. He stated that he has resided at the facility since 2008.

The Alliance Representative testified:

- She stated that she cannot dispute the facts as the appellant admits to violating the facility smoking regulations. Her concern is that the appellant is 83 years old and has lived at the facility for about 7 years and wants to stay at the facility.
- She stated that the appellant is very remorseful and understands the facility smoking policy. The appellant has no other placement options from this facility. The appellant suffers from Diabetes and Congestive Heart Failure; it would be

unsafe for him to leave the facility.

FINDINGS OF FACT

1. The facility notified the appellant by notice dated March 9, 2015 that he would be discharged from the facility effective 30 days from the date of the notice. The notice states that the reason for discharge is because the appellant has endangered the safety of individuals in the facility. The notice also states that the appellant has continually violated the smoking policy.
2. The appellant appealed the facility's notice to discharge on March 10, 2015. The appellant notified the DHS Appeals office via DHS 121 NF Request for Hearing Form on March 11, 2015 that he was requesting a fair hearing
3. The appellant filed a timely request for hearing and the facility complied with a timely explanation of their decision.

SUMMARY:

The issue to be decided is whether the facility was correct in its decision to discharge the appellant from the facility because he has endangered the safety of individuals in the facility due to his continued violation of the facility smoking policy.

Review of agency policy determines that the agency permits a patient to be transferred or discharged from a facility when the basis for discharge is that the safety of individuals in the facility is endangered; or the health of individuals in the facility would otherwise be endangered.

Agency policy also requires that the resident's physician must document the basis for the transfer or discharge in the resident's clinical record if the health or safety of individuals in the facility would otherwise be endangered. (DHS policy #0376.40.10.10)

The facility representative did testify to and submit evidence that the appellant has continually violated the facility's smoking policy. The facility representative submits that the appellant has on more than one occasion left the facility at night to smoke by unlocking the facility entrance. The appellant has also been found smoking inside the facility in an area that is not designated for smoking. The appellant is now on "supervised smoking" status. The appellant must be accompanied by facility staff to a designated smoking area in order to smoke at any of the designated times allowed by the facility.

The facility representative submitted copies of nursing and social service notes from the appellant's record. The notes indicate that on 11-19-2014 the appellant was found by a facility maintenance worker smoking in the facility library. On November 20, 2014 it was decided that the appellant must now be brought to the designated smoking area for his smokes by staff. He will have one cigarette, once staff lights it he may smoke alone.

On November 21, 2014 staff found the appellant smoking in the smoking room with a box of cigarettes. The cigarettes were taken away and locked in the back room. On that

same date the appellant was again found smoking in the smoking room with another resident.

On November 25, 2014 the appellant was found smoking in the smoking room. The appellant reported that the cigarette was given to him by "somebody". The supervised smoking rules were again reiterated to the appellant.

On December 16, 2014 the appellant was found with a lighter and cigarettes without a staff member having supervised. He would not release the lighter and cigarette to staff and was upset due to having to wait for staff to smoke.

On February 11, 2015 the appellant stated he had a cigarette lighter and handed it over to a staff member. On February 13, 2015 the appellant was witnessed smoking by himself outside the facility double doors after midnight. He had not told staff that he was going to smoke. On February 14, 2015 he was found outside taking a lighter out of his coat pocket to light a cigarette. The lighter was taken and locked up.

On March 2, 2015 the appellant became upset and swore at staff members when he wanted to go outside and smoke at 11:55 PM. On March 5, 2015 the appellant was found outside after hours smoking a cigarette. The appellant had unlocked the facility doors and was unsupervised.

On March 9, 2015 a meeting was held with the appellant, facility administrators, nursing services and social services. The resident was told he continues to violate the facility smoking policy by having smoking material and going out after 9:00PM. The appellant was told that because of this continuing behavior a 30 day notice of discharge would be issued that date.

The appellant testified that he has cooperated with the facility's supervised smoking arrangement. He is accompanied by a staff member to the designated smoking areas and the staff member lights his cigarette. He stated that he does not remember an incident when he was found smoking in the facility library. He only smokes in the smoking room and in the designated outside areas. He stated that he has been a resident for about 7 years. The staff has been good to him and he wants to continue to reside at the facility.

The Alliance representative stated that the appellant has admitted to violating the facility smoking regulations in the past. She submits that the appellant is very remorseful and understands the facility smoking policy. Her concern is that the appellant is 83 years old; he has resided at the facility for 7 years, has multiple health issues, and has no other placement options available to him.

CONCLUSION:

The facility has issued a discharge notice dated March 9, 2015 notifying the appellant that due to his non-compliance with the facility smoking regulations he has endangered the safety of individuals in the facility.

Review of the facility notes submitted subsequent to the hearing determines that notes from the nursing staff and social service staff document ongoing violation of the

facility smoking regulations by the appellant. It is clear that the appellant has violated the facility smoking regulations.

However there is no document in the clinical record from the appellant's physician indicating that due to the appellant's behavior the health or safety of individuals in the facility is endangered. As mentioned, agency policy (0376.40.10.10) specifically requires that a resident's physician must document the basis for the resident's transfer or discharge in the resident's clinical record if the health or safety of individual's in the facility would be otherwise endangered. In this matter the facility has not submitted the above-cited documentation from the appellant's physician.

The facility did not submit into evidence documentation that the appellant had agreed to and signed a Supervised Smoking agreement or similar document that makes specific mention of penalty or sanctions imposed for dangerous behavior.

The facility has not provided the required physician's documentation to substantiate its claim that as a result of the appellant's behavior the health and safety of residents and staff is endangered.

The facility and the appellant followed the required agency procedure with regard to discharge notification and subsequent request for fair hearing.

After a careful review of the agency's policies as well as the evidence and testimony given, the Hearing Officer finds that the appellant's request for relief is granted.

APPEAL RIGHTS (see last page)



Michael Gorman
Hearing Officer

APPENDIX

Involuntary Relocation Restrictions 0376.40.05.05
REV: 06/2000

The Nursing Home Resident Protection Amendments of 1999 prohibit the transfer or discharge of residents from a nursing facility as a result of the facility's voluntary withdrawal from participation in the Medicaid Program.

Individuals residing in a nursing facility on the day before the effective date of the facility's withdrawal from MA participation may not be transferred or discharged as a result of the facility's withdrawal. This includes residents receiving MA benefits at the time, as well as individuals who are residents but not yet eligible for MA.

To continue receiving MA payments, the nursing facility must comply with all Title XIX nursing facility requirements related to treating patients residing in the facility in effect at the

0376.40.05.05

time of its withdrawal from the program.

Involuntary relocation of a resident patient is permitted when the basis for discharge or transfer is:

- * to meet the resident's welfare and that welfare cannot be met in the facility;
- * the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- * the safety of individuals in the facility is endangered;
- * the health of individuals in the facility would otherwise be endangered;

Involuntary Relocation Restrictions 0376.40.05.05 3

- * the resident has failed, after reasonable and appropriate notice, to pay (or have paid by Medicare or Medical Assistance) for a stay at the facility; or
- * the facility ceases to operate.

NF Patient Appeal Rights

0376.40.10

REV: 06/1994

Section 1919 (e) (3) of the Social Security Act requires States to provide appeal hearings for all nursing facility residents who wish to challenge their transfers or discharges. By statute, the appeals process cannot be limited to only Medical Assistance eligible nursing facility residents. Therefore, DHS will conduct administrative hearings for any NF resident who wishes to appeal a transfer or discharge from the facility, whether Medical Assistance or Medicare eligible, or private pay.

Transfer Discharge Criteria

0376.40.10.05

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REV: 06/1994

The basis for the transfer or discharge must be documented in the resident's clinical record by the resident's physician if:

- o The transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility;
- o The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- o The health of individuals in the facility would otherwise be endangered.

Transfer Discharge Criteria 0376.40.10.05

The basis of the transfer or discharge must be documented in the resident's clinical record if the safety of individuals in the facility is endangered.

Each nursing facility must display a notice which identifies the transfer and discharge criteria and informs residents of their appeal rights. The notice should be prominently posted along with the Patient's Bill of Rights.

Documentation Requirements 0376.40.10.10
REV: 06/1994

The basis for the transfer or discharge must be documented in the resident's clinical record by the resident's physician if:

- o The transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility;
- o The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- o The health of individuals in the facility would otherwise be endangered;

Documentation Requirements 0376.40.10.10
The basis or transfer or discharge must be documented in the

resident's clinical record if the safety of individuals in the facility is endangered.

Each nursing facility must display a notice which identifies the transfer and discharge criteria and informs residents of their appeal rights. The notice should be prominently posted along with the Patient's Bill of Rights.

Pre-Transfer/Discharge Notice
REV: 06/1994

0376.40.10.15

Before effecting a transfer or discharge of a resident, a nursing facility must:

- o Notify the resident (and, if known, an immediate family member or legal representative of the resident) of the transfer or discharge and of the reasons for the move; and,
- o Record the reasons in the resident's clinical record (including any required documentation).

The nursing facility must notify the resident by use of a PRE-TRANSFER or PRE-DISCHARGE NOTICE (DHS-100NF) at least thirty (30) days in advance of the resident's transfer or discharge. At the time the patient receives the Pre-Transfer or Pre-Discharge Notice,

Pre-Transfer/Discharge Notice 0376.40.10.15 2
s/he receives at the same time a NOTICE OF YOUR TRANSFER AND DISCHARGE RIGHTS (DHS-200NF) and a copy of REQUEST FOR A HEARING (DHS-121NF).

Thirty (30) day advance notice is not required under the following circumstances:

- o In the event of danger to the safety or health of the individuals in the facility;
- o When the resident's health improves sufficiently to allow a more immediate transfer or discharge;
- o Where a more immediate transfer or discharge is necessitated by the resident's urgent medical needs;
- o When the resident has not resided in the facility for a

period of at least 30 days.

In the case of such exceptions, notice must be given as many days before the date of the move as is practicable, and include:

- o The right to appeal the transfer or discharge through the administrative appeals process;
- o The name, mailing address, and telephone number of the State long-term care ombudsman.

In the case of residents with developmental disabilities, the pre-transfer or pre-discharge notice must include:

- o The mailing address and telephone number of the agency responsible for the protection and advocacy system for developmentally disabled individuals.

Pre-Transfer/Discharge Notice 0376.40.10.15

The resident must request an appeal within thirty (30) days of the date of the pre-transfer/discharge notice.

APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Human Services pursuant to RI General Laws §42-35-12. Pursuant to RI General Laws §42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.